



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

I

[REDACTED]
[REDACTED]
FOO/167878

PRELIMINARY RECITALS

Pursuant to a petition filed August 06, 2015, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Office of the Inspector General (OIG) in regard to FoodShare benefits (FS), a telephonic hearing was held on August 27, 2015, at Green Bay, Wisconsin. During that hearing, the parties agreed to the following scheduling order: a) this ALJ would issue a first "preliminary" decision in the above-captioned FS IPV case, and then if requested by the petitioner's attorney a hearing (with Somali interpreter) would be scheduled to address any issues in petitioner's FS overpayment case in FOP/165965; b) a briefing schedule was set for petitioner's supplemental argument by August 31, 2015, OIG's responsive written argument by September 8, 2015, with a final reply by petitioner's attorney by September 17, 2015. OIG and petitioner's representative both timely submitted their briefs to DHA which are received into the hearing record. Attorney [REDACTED] on behalf of the petitioner waived the Moua time limits for the decision in this case per his August 6, 2015 letter to DHA.

The issue for determination is whether the Department erred in imposing a one-year FS intentional program violation (IPV) sanction against the petitioner based upon a Court finding of guilt of a county welfare ordinance.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney [REDACTED]
Legal Action of Wisconsin

[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED], at hearing; and [REDACTED], written submissions

Office of the Inspector General
Department of Health Services
1 West Wilson Street
Madison, WI 53701

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident current of Virginia, but was a resident of Wisconsin during the period relevant to the petitioner's FS intentional program violation (IPV) and FS overpayment cases.
2. The Brown County Sheriff investigated petitioner for allegedly using her FS benefits to pay "tabs" that she had accumulated at [REDACTED] in Green Bay, Wisconsin, and whether she was possibly paying for food at some point in time after it was purchased, or was otherwise applying her FS benefits to pay unknown debts at that store.
3. Petitioner was issued a citation for violating Brown County ordinance 30.05(2), "Interfering with Proper Administration of Public Benefits" on October 24, 2014. The Brown County Office of the Sheriff mailed the ordinance citation to the petitioner, informing her, in part, that a conviction would result in a one-year bar from receiving FS for a first violation. See Exhibit R-2.
4. After a court trial before Brown County Circuit Court Judge [REDACTED] on June 5, 2015, petitioner was found guilty of violating Brown County ordinance 30.05(2), "Interfering with Proper Administration of Public Benefits," a subsection of the ordinance entitled "Prohibiting Fraud in Public Assistance." Exhibits R-1 and Petr Ex. 6. The petitioner was represented by Attorney Alf Langan at that Court trial.
5. The Department's representative, [REDACTED], who appeared at the August 27, 2015 DHA hearing in the above-captioned case did not appear at the June 5, 2015 Court hearing in Brown County Circuit Court Case No. 2014FOOO649.
6. OIG [REDACTED] did testify at the June 5, 2015 Court trial, but she did not appear or testify at the August 27, 2015 hearing before DHA. Ms. [REDACTED] only submitted a September 8, 2015 post hearing written argument to DHA.
7. The Department did not submit into the hearing record any evidence or transcript of the June 5, 2015 Court Order to determine whether the Judge made any specific findings to meet the requirements for imposing a FoodShare disqualification against the petitioner under 7 C.F.R. 273.16.
8. Petitioner had no prior program violations. Following the guilty verdict, the state FS agency imposed a one-year bar on petitioner receiving FS.

DISCUSSION

The process of imposing an IPV is detailed in the Code of Federal Regulations at 7 CFR 273.16. The Federal regulations provide for an imposition of an IPV through several mechanisms. An agency may initiate an administrative disqualification hearing (see 7 CFR 273.16(e)); or by waiver (see 7 CFR 273.16(f)). But, an IPV may also be based on a civil or criminal court action **establishing the facts supporting the IPV in a court of appropriate jurisdiction.** (Emphasis added). See 7 CFR 273.16(g). The Federal rule state "[t]he State agency should conduct administrative disqualification hearings in cases in which the State agency believes the facts of the individual case do not warrant civil or criminal prosecution through the appropriate court system...." 7 CFR 273.16(a).

In this case, the FS agency and the prosecuting authority proceeded with a prosecution of this matter as a civil forfeiture matter as a violation of § 30.05(2). Petitioner did not personally appear at the bench trial, but petitioner was represented by counsel who appeared on her behalf. The court found petitioner guilty of violating section 30.05(2) of the Brown County Code, entitled Prohibiting Fraud in Public Assistance Cases.

The Federal rule also allows for the agency's imposition of an IPV after a finding of guilt by a court:

(7) If a court fails to impose a disqualification or a disqualification period for any intentional program violation, the State agency shall impose the appropriate disqualification penalty specified in paragraphs (b)(1), (b)(2), (b)(3), (b)(4), and (b)(5) of this section unless it is contrary to the court order.

7 CFR 273.16(a)(7), see also § 273.16(g)(2).

Under 7 C.F.R. 273.16, a state may establish an IPV and impose a disqualification through various means, including an administrative disqualification hearing where the state presents evidence of an alleged IPV. In the instant case, OIG decided to refer the matter for prosecution as allowed by the federal regulations. But, when electing this approach OIG assumed the risk that the Court will find the individual guilty of an offense that does not include the elements of an IPV as set forth in 7 C.F.R. sec. 273.16(c), or that the Court may not make findings that are sufficient to establish that the elements of an IPV have been proved. The only evidence of the Court's determination is that the petitioner was found guilty of violating sec. 30.05(2) of the Brown county ordinances. However, a violation of that provision is not the equivalent of an IPV.

The petitioner's representative, Attorney [REDACTED], argued at hearing and in his written briefs (August 28, 2015 and September 14, 2015) that the Department failed to establish in the Circuit Court's Judge's Order that the guilty verdict met the requirements for imposing a FoodShare IPB against the petitioner's FS under 7 C.F.R. 273.16. Basically Attorney [REDACTED] argued that the Department failed to provide any Court records or non-hearsay evidence of the Court's determination and findings, and thus the conviction alone is not sufficient. Jamerson v. Department of Children and Families, 2013 WI 7, 345 Wis. 2d 205, 824 N.W.2d, 822 (2013). Mr. [REDACTED] argued that OIG did not provide any evidence that the Court made any findings that the petitioner committed an IPV or that the Court established the facts necessary to establish a FS IPV.

In Jamerson, the Wisconsin Supreme Court found that the conviction in question did not necessarily include the elements of a disqualifying offense and that there was nothing in the record of the court proceedings to show that the offense involved Food Stamps or fraudulent activity. In other words, it must be shown that the conviction satisfied the elements of the offense for which the sanction may be imposed, and in this case met the requirements found in 7 C.F.R. 273.16(b)(1) and (g)(2) that a FS disqualification based upon a prosecution be based on a Court finding that an intentional program violation was committed.

In his August 28, 2015 initial brief, Attorney [REDACTED] argued persuasively that the Brown County June 6, 2015 Circuit Court determination does not establish that the petitioner committed an IPV:

This is because there is no showing in the Court records before DHA that the Petitioner was found guilty of an ordinance violation that in and of itself constitutes an IPV as defined in 7 C.F.R. § 273.16(c); the petitioner was not found guilty of violating a state FoodShare statute; and there is no showing that the Court made findings that the Petitioner committed acts that can be said to equate to an IPV under 7 C.F.R. § 273.16(c).

Petitioner's attorney argued that it is not possible to establish an IPV based solely on a finding of guilt where the Court Order that the ordinance under which petitioner was convicted is too vague and does not specify any of the grounds establishing that the petitioner committed an IPV. Mr. [REDACTED] further argued at hearing, and in his written submissions that the ordinance under which petitioner was convicted does not specify any of the grounds establishing that the petitioner committed an IPV and that the record does not otherwise demonstrate that her conduct constitutes an IPV.

The Brown County Circuit Court determined, in a June 2015 written order that the petitioner was found guilty of violating section 30.05(2) of the Brown County Code. However, petitioner argued that a conviction under section 30.05(2) of the Brown County Code does not equate to an IPV. An IPV is defined as follows:

Definition of intentional Program violation. Intentional Program violations shall consist of having intentionally:

- (1) Made a false or misleading statement, or misrepresented, concealed or withheld facts; or
- (2) Committed any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization cards or reusable documents used as part of an automated benefit delivery system (access device).

7 C.F.R. 273.16(c).

The Department has not provided non-hearsay testimony and documentation to establish that the petitioner's Court ordinance conviction under 30.05(2) pertained to the FS public assistance program. Moreover, the Department's IPV case against petitioner was further undermined by the following: a) the Department's representative, [REDACTED], who appeared at the August 27, 2015 hearing in the above-captioned case did not appear at the June 5, 2015 Court hearing in Brown County Circuit Court Case No. 2014FOOO649; b) Ms. [REDACTED] provided only hearsay testimony regarding the June 5, 2015 Court hearing; c) While [REDACTED] testified at the June 5, 2015 Court trial, she did not appear or testify at the August 27, 2015 hearing before DHA. Ms. [REDACTED] only submitted post hearing written argument to DHA after the hearing; d) the Department did not submit into the hearing record any transcript of the June 5, 2015 Court hearing. Accordingly, based upon the above, I conclude that the Department erred in imposing a one-year FS intentional program violation (IPV) sanction against the petitioner based upon a Court finding of guilt of a welfare county ordinance.

CONCLUSIONS OF LAW

The Department erred in imposing a one-year FS intentional program violation (IPV) sanction against the petitioner based upon a Court finding of guilt of a county welfare ordinance.

THEREFORE, it is

ORDERED

That the matter is remanded to the OIG with instructions to rescind the one year IPV sanction against the petitioner, within 10 days of the date of this Decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

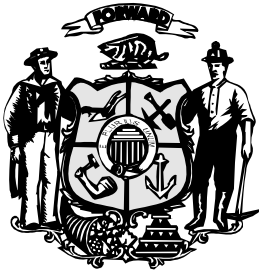
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 9th day of November, 2015

\sGary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 9, 2015.

Office of the Inspector General
Division of Health Care Access and Accountability
Attorney [REDACTED]